IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al.*,

Plaintiffs,

vs. Civ. No. 02-582 (CKK, KLH, RJL)

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

-- BRIEF OF *AMICI CURIAE* --

THE STATES OF IOWA, VERMONT,

ALASKA, COLORADO, CONNECTICUT, HAWAII,

KANSAS, KENTUCKY, MAINE, MASSACHUSETTS,

MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA,

NEW MEXICO, OKLAHOMA, RHODE ISLAND, WASHINGTON

THE TERRITORY OF THE UNITED STATES VIRGIN ISLANDS

AND THE COMMONWEALTH OF PUERTO RICO

-- IN SUPPORT OF DEFENDANTS --

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TABLE OF CONTENTS

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. The BCRA limits its reach to campaign activities that influence federal elections and does not violate the Tenth Amendment or constitutional principles of federalism 6

A. The BCRA only regulates activity that influences the outcome of federal elections 7

1. The Act's regulation of federal election activity is appropriately limited 8
2. Congress has the authority to regulate national party fundraising . 10
3. The Act does not regulate elections for state offices 10

B. The Act does not violate the Tenth Amendment or principles of federalism 11

1. The Act is a necessary and proper exercise of Congress's power to regulate federal elections 13
2. The BCRA's regulation of federal election activity does not impermissibly interfere with state sovereignty 19

II. The BCRA serves the interests of the States and their citizens by restoring integrity to the national political process, while at the same time fostering substantial political discourse 22

III. Although campaign finance laws are subject to heightened scrutiny, the courts should afford some latitude to state and federal lawmakers who are searching for ways to restore the faith of citizens in their elected officials 27

Conclusion 30

INTEREST OF AMICI

The amici States bring two particular interests to this litigation. First, the States as sovereigns have a keen interest in the constitutional principles that govern the regulation of elections and campaign finance. The States bear substantial responsibility for conducting and policing elections. And State Governments, like the Federal Government, are diminished when citizens lose faith in their elected officials. States accordingly have pursued different types of campaign finance reform, in a continuing effort to restore integrity to our democratic processes. *See* 33 Council of State Governments, *The Book of the States 2000-2001* 174-232 (summarizing state legislation). Just as *Buckley v. Valeo,* 424 U.S. 1 (1976), has for years framed the debate on campaign finance legislation at both the state and federal level, the decision in this case will also have a profound impact on both state and federal elections.

Second, as partners in our federalist system of government, the States have an ongoing interest in the proper division of power between the Federal and State Governments. The plaintiffs in this litigation have alleged that Congress has overstepped its bounds by broadening the reach of federal election laws. The amici States strongly disagree, and are perhaps uniquely suited to defending Congress's exercise of its authority in this context.

STATEMENT OF THE CASE

This case presents a constitutional challenge to the Bipartisan Campaign Reform Act of 2002 ("BCRA," or the "Act"). Congress drafted the Act primarily to curb the use of "soft money" in federal elections. Soft money is money that does not comply with federal contribution limits or source prohibitions. Under prior law, political parties could raise and spend soft money in a variety of ways that supported federal candidates and influenced the outcome of federal elections, thus evading both the limits on individual contributions and the restrictions on corporate and union contributions. As a result of the soft money loophole, the contribution limits upheld by the Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976), had become virtually meaningless.

Title I of the BCRA closes the soft money loophole, in three ways. First, it prohibits national political parties from raising and spending any money that does not comply with federal contribution guidelines. BCRA, tit. I, sec. 101(a), § 323(a). Second, it prohibits federal officeholders and federal candidates from raising or spending any money in connection with any election (for themselves or others) unless the money complies with federal law. *Id*. § 323(e). And third, the Act requires state parties engaging in "federal election activity" to fund that activity with money raised in accordance with federal limits. *Id*. § 323(b). Federal election activities include communications that promote federal candidates as well as voter registration and get-out-the-vote drives conducted in advance of a federal election. *Id*. sec. 101(b).

In Title II, Congress turned to the related problem of political advertising by corporations and unions. The Act prohibits corporations and labor unions from using certain treasury funds to pay for a narrow class of broadcast, cable or satellite communications that (1) refer to a clearly identified federal candidate and (2) are aired in the candidate's geographic area within sixty days of a federal election (or thirty days of a federal primary). BCRA, tit. II, sec. 203. The Act's new definition of "electioneering communication" creates a bright-line distinction between genuine issue ads and ads that seek to directly influence the outcome of federal elections. *Id*. sec. 201. Corporations and unions that want to fund campaign ads may still do so, but only through corporate or union PACs that are funded solely by voluntary individual contributions. *Id*. sec. 203.

Title II does not limit the broadcast of campaign ads by other groups or individuals, but does require disclosure once a group or individual's expenditures reach $10,000. *Id*. sec. 201. It also imposes reporting requirements for certain independent expenditures (expenditures that "expressly advocate the election or defeat of a clearly identified candidate), and requires political parties to choose between making independent or coordinated expenditures on behalf of a candidate. *Id*. sec. 212, 213.

Although the Act contains a number of other provisions, the ban on soft money and the prohibition of electioneering communications by corporations and unions form the core of Congress's reform effort. The plaintiffs in these consolidated lawsuits have challenged the Act on a variety of constitutional grounds, including the First, Tenth, and Fourteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

The amici States support the Federal Government in its defense of the BCRA because they agree that the Act is both constitutional and essential to the health of our national democracy. Notwithstanding the plaintiffs' Tenth Amendment claims, the Act is a constitutional exercise of Congress's power to regulate federal elections. It benefits the States and their citizens by attacking the causes of the cynicism and distrust that undermine our political discourse. Rather than accepting the plaintiffs' arguments in this case, the Court should uphold the Act, and allow both state and federal lawmakers to continue their efforts to find a constitutional solution to this pressing national problem.

The amici States are particularly troubled by the plaintiffs' effort to obstruct Congress's crucial reform effort with claims of "federalism." The States have a particular expertise in the area of federalist jurisprudence, and they pay close attention to the constitutional division of authority between the Federal and State Governments. It was, after all, the States that entered into the plan of convention that created the federal system of dual sovereignty and determined which powers would be given to the new federal government.

In the States' view, the plaintiffs' effort to challenge the BCRA on federalism grounds is wholly unsupported. The Act is a carefully tailored statute that regulates only those campaign activities that influence the outcome of federal elections. Congress has not reached beyond its delegated constitutional authority, see U.S. Const. art. I, § 4 , in an effort to regulate purely local matters or to intrude on the sovereignty of the States. The Act is a constitutional exercise of the power the States conferred upon Congress, not an infringement on the powers the States reserved to themselves.

Congress's decision to eliminate the corrupting influence of soft money on federal elections benefits both the States and their citizens. The States and their citizens rely on the integrity and commitment of federal office holders. And, perhaps more importantly, State and local governments suffer from the disaffection and alienation of their citizens caused by the perception that "money talks" in the political system. By limiting the influence of money in politics, the BCRA will strengthen both our political discourse and our democracy.

Congress is not alone in seeking to restore the public's faith in the government. The States must also ensure the integrity of their elections and office holders, and so state legislatures continue to debate and enact campaign finance legislation. The Court should give some deference to the judgment of lawmakers and develop constitutional principles that allow both the States and the Federal Government to find ways to limit the corrupting influence of money in the political process.

ARGUMENT

I. The BCRA limits its reach to campaign activities that influence federal elections and does not violate the Tenth Amendment or constitutional principles of federalism.

In our federalist system of government, the States retain substantial sovereign powers. *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (Constitution establishes a system of dual sovereignty, in which the States retain a "'residuary and inviolable sovereignty'") (quoting The Federalist No. 39, at 245

(J. Madison)). The Attorneys General of the several States as a rule jealously guard those powers against encroachment by the federal government. But the

Attorneys General also recognize that not *all* powers of governance have been – or should be – reserved to the States. The Constitution rightly assigns certain powers to Congress, including the power to regulate federal elections. U.S. Const. art. I, § 4.

The BCRA is a constitutional exercise of that power, for two reasons. First, the Act is targeted to reach only activity that influences the outcome of federal elections. Second, the Act does not violate the Tenth Amendment or other constitutional principles of federalism. To the contrary, BCRA is an urgently needed national solution to a national problem.

A. The BCRA only regulates activity that influences the outcome of federal elections.

In drafting the BCRA, Congress took careful notice of the division between federal and state responsibility for regulating elections. This task was not a simple one because, by tradition and practice, federal and state elections are held together and federal and state campaigns are closely intertwined. Congress carefully tailored its reform effort to reach those campaign activities, even those conducted at the state level, that influence the outcome of federal elections. At the same time, the Act leaves untouched those campaign activities that relate solely to state elections.

Three aspects of the BCRA are relevant here. First, building on the existing regulation of state parties, the Act reasonably requires all federal election activity by state parties to be paid for with money raised in accordance with federal law. Second, the Act protects the integrity of the federal election process by requiring national parties and federal officeholders and candidates to comply with federal contribution limits in all circumstances. And third, as important as what the Act does is what it does not do – it does not regulate campaign activities that are directed solely at state elections.

1. The Act's regulation of federal election activity is appropriately limited.

The Act's regulation of campaign activities conducted by state parties extends only to those activities that influence the outcome of federal elections. State parties must comply with federal law only for funds spent on "federal election activity."[1] Federal election activity, in turn, is defined as (1) voter registration activity within 120 days of a federal election, (2) voter identification, get-out-the-vote activity or generic campaign activity (activity that promotes parties rather than candidates) conducted in connection with a federal election,

[1] The Act provides two avenues for state parties to fund federal election activity. The parties may use, in a combination to be set by regulation, a mix of "pure" federal money and money raised in accordance with the somewhat less restrictive provisions of § 323(b). The latter section permits the use of certain funds raised as permitted by state law, in amounts not greater $10,000 per person.

regardless of whether candidates for state office appear on the same ballot, (3) public communications that support or oppose federal candidates, and (4) services provided by party employees who spend a certain percentage of their time on activities in connection with a federal election. BCRA, tit. I, sec. 101(b), § 20(a). All of these activities influence the outcome of federal elections and are reasonably subject to federal regulation. When parties register voters, and drive voters to the polls, the voters cast ballots for federal candidates. When voters are influenced in the weeks before a federal election by signs and campaign ads that urge them to "Vote Democratic" or "Vote Republican," they are influenced to vote for federal candidates.

These campaign activities that influence federal elections may also influence state elections, but they are nonetheless subject to federal regulation. Although state parties were previously permitted to use a mix of federal and non-federal money to fund these activities, see 11 CFR 106.5, that approach is not constitutionally mandated. When federal candidates are on the ballot, every dollar spent by a party to register a voter, get a voter to the polls, or convince a voter to vote the party line, is a dollar spent to influence the outcome of the federal election. The previous "apportionment" approach proved to be a loophole through which substantial amounts of soft money were used to influence the outcome of federal elections. BCRA merely closes the loophole.

2. Congress has the authority to regulate national party fundraising.

The limits on national parties and federal candidates and officeholders protect the integrity of federal elections. The Act generally requires all funds raised and spent by the national parties and federal candidates and officeholders to meet federal requirements. For example, a national party cannot raise unregulated funds and then spend them on a state gubernatorial election, even if there are no federal candidates on the same ballot. A federal officeholder, such as a member of Congress, is subject to the same restriction. Congress recognized that fundraising activity at the national level is inextricably linked to federal elections and offices, even if the money is spent at the state or local level. Party leaders may pressure their candidates and officeholders to raise money for other races, and may look to fundraising prowess when handing out committee assignments and chairs. *See, e.g.,* Richard A. Oppel, *Records Falling in Waning Days of Soft Money*, New York Times (Sept. 30, 2002). The restrictions on fundraising at the national level help counter the negative influence of fundraising and soft money on the federal electoral process.

3. The Act does not regulate elections for state offices.

What Congress refrained from doing is as important as what it did. The Act's regulation of federal campaign activity excludes state party conduct that deals only with candidates for state office. To the extent permitted by state law, state parties may continue to raise funds to support their state candidates, to contribute those funds to the candidates, and to spend money on communications and materials that promote state candidates. BCRA, tit. I, sec. 101(b), § (20)(B). State candidates are similarly free to run their own campaigns as permitted by state law, so long as they do not campaign on behalf of federal candidates. *Id*. sec. 101(a), § 323(f). And, the soft money limitations that apply to state parties only apply when state and federal elections are held together, so stand-alone state elections are unaffected.

B. The Act does not violate the Tenth Amendment or principles of federalism.

Notwithstanding the careful distinctions drawn in the Act between federal and state election activity, the plaintiffs in this litigation claim "federalism" as a basis for overturning it. The States, and their Attorneys General, are always sensitive to claims that Congress has overstepped its constitutional authority by regulating in an area reserved to the States. Here, however, the amici States cannot join the plaintiffs in their unsupported claim that the BCRA violates principles of federalism and the Tenth Amendment.

Plaintiffs' federalism claims are barely developed in the complaints. For example, the California plaintiffs contend merely that the Act violates the Tenth Amendment by "imposing federal limitations on activities which are state or local in nature and which are already regulated and specifically permitted by the state." California Compl. ¶¶ 60, 66, 72; *see also* McConnell Compl. ¶¶ 70, 79, 84, 89.[2] The Act, however, is easily distinguished from most Tenth Amendment cases because it does not regulate the States directly. *See, e.g., New York v. United States*, 505 U.S. 144, 160-61 (1992) (summarizing Tenth Amendment case law dealing with congressional regulation of states).[3] The Tenth Amendment does not prevent Congress, when it has authority to regulate, from prohibiting private conduct that the States have allowed.

Because Congress has not attempted to regulate the States themselves, plaintiffs' Tenth Amendment or federalism claims are really no more than an

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[2] Before addressing the merits of any Tenth Amendment claim, this Court must consider whether the private plaintiffs bringing these lawsuits have standing to raise such a claim. This circuit has recently acknowledged that private plaintiffs' standing to raise a Tenth Amendment claim is "uncertain." *Lomont v. O'Neill*, 285 F.3d 9, 14 n.3 (D.C. Cir. 2002). Some circuits have allowed such claims to go forward, see *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700-04 (7th Cir. 1999), but as the Court noted in *Lomont*, Supreme Court precedent suggests that private parties may not assert claims under the Tenth Amendment. *Lomont*, 285 F.3d at 14 n.3; *see Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939). The amici States take no position on this issue, but merely note that it raises a possible impediment to the Tenth Amendment claims raised by the plaintiffs.

[3] Most of the Supreme Court's recent federalism decisions are irrelevant here. The Act does not commandeer either state legislatures, by requiring them to enact federal law, or state officials, by requiring them to enforce federal law. *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) ("Federal Government may not compel the States to implement, by legislative or executive action, federal regulatory programs"). It does not expose the States to liability or suit in violation of sovereign immunity. *See*, *e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) ("Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States"); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (Congress may not subject States to liability in state courts).

argument that Congress has exceeded its delegated authority under the Constitution by regulating in an area reserved to the States. An argument of this sort involves two inquiries: first, whether the challenged statute "is authorized by one of the powers delegated to Congress in Article I," and second, whether the statute "invades the province of state sovereignty reserved by the Tenth Amendment." *New York v. United States*, 505 U.S. at 155. As the Supreme Court recognized in *New York v. United States*, these two inquiries may be "mirror images of each other." Regardless, whether analyzed through the lens of Congress's delegated powers or the sovereignty reserved to the States, the Act is constitutional.

1. The Act is a necessary and proper exercise of Congress's power to regulate federal elections.

No party to this suit can question Congress's "well established" constitutional power to regulate federal elections. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); U.S. Const. art. I, § 4. That power extends to regulating the conduct of campaigns, including campaign finance and disclosure requirements. *Id*. The Constitution provides that Congress may make all laws "which shall be necessary and proper" for the execution of this power. U.S. Const. art. I, § 8.

The BCRA, including its definition of "federal election activity," is a constitutional exercise of Congress's authority, for three reasons: (1) the Act only regulates federal elections; (2) although the Act inevitably impacts some state campaign activities, it goes only as far as necessary to accomplish the federal purpose; and (3) the Act does not intrude on matters purely local in nature, and accordingly bears no resemblance to the types of statutes the Supreme Court has invalidated as exceeding Congressional authority.

First, the Act is designed to regulate federal elections only. Congress carefully drafted the statute to avoid regulating stand-alone state elections. In fact, the Act has no relevance to a state election where there is no federal candidate on the ballot. Nor does the Act prescribe standards for campaigns for state offices, even where those state elections are on the same ballot as a federal election.

Because some state elections are typically on the ballot with federal elections, some impact on those state elections and campaigns is inevitable. The plaintiffs freely concede that their campaigns for federal and state elections are closely intertwined. *See* California Complaint ¶¶ 30, 33, 36, 38. Common sense tells us that any generic party campaign activity – activity not tied to a particular candidate on the ballot – will influence both the federal and state contests in a given election. As a result, Congress could not possibly reach all federal election activity without sweeping in some state election activity. But the impact is incidental. The Act is not intended to regulate state election activity.

Second, the Act goes only as far as necessary to accomplish the federal purpose of reinvigorating federal campaign contribution limits and eliminating the influence of soft money in federal elections. The uncontrolled explosion in soft money raised by the major political parties over the past two decades shows that the previous rules, which allowed state parties to apportion spending on federal election activities, did not work. Soft money flowed into the state parties to be used for advertising and campaign activities that directly influenced the outcome of federal elections. According to national press reports, the problem continues in the 2002 election cycle, in which the parties are breaking fundraising records and pouring soft money into local congressional campaigns. *See*, *e.g.*, Richard A. Oppel, Jr., *Records Falling in Waning Days of Soft Money*, New York Times (Sept. 30, 2002) (noting that soft money is funneled to state parties, which use it to purchase "televised issue advertisements that are really designed to bolster the party's candidate or disparage the opponent"); Robin Toner, *Where Candidates May Fear to Tread, National Parties Stampede In*, New York Times (Sept. 28, 2002) (describing influence of television advertising by national and state parties in a congressional election).

Any suggestion by the plaintiffs that Congress could have accomplished its goal without regulating the campaign activities of the state parties is wholly unsupportable. The plaintiffs acknowledge that party campaign activities for state and federal elections are closely intertwined and that the state parties play a substantial role in the campaigns for federal offices. For example, the California plaintiffs admit that they make public communications that identify federal candidates, s*ee* California Complaint" ¶ 30, and that they make both coordinated and independent expenditures in support of federal candidates, *id*. ¶ 33. The state parties engage in extensive fundraising activities that include both state and federal candidates and officeholders. *Id*. ¶ 36. And they follow a cooperative "party ticket" campaign approach in which the national and state parties, and federal and state candidates, work together on a variety of campaign activities "to maximize the effectiveness of available party resources." *Id*. ¶ 38. Given that federal and state campaign activities are intermeshed to this degree, Congress had to reach as far as it did to root out the use of unregulated soft money to influence the outcome of federal elections.

Third, because the Act is designed to regulate federal election activity, it does not intrude on purely local matters that the Constitution reserves to state authority. Nothing in the Supreme Court's decisions addressing the scope of Congress's authority under the Commerce Clause suggest that BCRA is problematic. In fact those decisions support the Act's constitutionality. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

In both *Lopez* and *Morrison*, the Supreme Court struck down federal efforts to regulate local, noneconomic criminal conduct. The Court reasoned that this type of conduct – sexual assault in *Morrison* and carrying a weapon near a school in *Lopez* – was a matter of local concern, even if local crimes have some attenuated impact on the national economy. The Court declined to adopt an expansive view of the Commerce Clause that would effectively remove "any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez,* 514 U.S. at 564. The BCRA is easily distinguished from the statutes struck down in *Lopez* and *Morrison*, both because the Act is closely tied to Congress's power to regulate federal elections, and because the Act itself recognizes limits on federal authority over matters of local concern.

Unlike in *Lopez* and *Morrison*, in this case the connection between Congress's delegated power – the power to regulate federal elections – and the activity regulated is substantial and direct. Both *Lopez* and *Morrison* concerned efforts by Congress to use its Commerce Clause power to regulate noneconomic, intrastate activity. The Court reasoned that if the Commerce Clause power could be interpreted as broadly as the federal government suggested, it would undermine the federalist framework of dual sovereignty, within which the Federal and State governments share power. *See*, *e.g*., *Lopez*, 514 U.S. at 557 (embracing an unlimited view of the Commerce Clause would lead to the creation of a centralized government). Here, however, the Act is not premised on an expansive interpretation of Congress's authority. Congress has used its power to regulate federal elections only to reach conduct that influences the outcome of those elections.

In addition, in both *Lopez* and *Morrison* the Court was concerned about the lack of discernible limits on congressional power. No such problem is presented here. The Act itself implicitly recognizes that the power to regulate federal elections has limits. BCRA regulates federal election activity, which inevitably includes some campaign activity that influences both state and federal elections. It does not regulate state election activity that has no connection to federal elections. Thus, Congress has recognized and respected what the Constitution requires: "a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18.

2. The BCRA's regulation of federal election activity does not impermissibly interfere with state sovereignty.

As noted, the Tenth Amendment inquiry may also proceed from the opposite direction – not whether Congress has exceeded its delegated authority, but whether the challenged statute intrudes too far on state authority. Conceptually, it may be difficult to separate these concerns. Considering the Act from the perspective of state sovereignty, rather than Congressional power, however, the States offer three reasons why the BCRA is consistent with constitutional principles of federalism:

(1) the framework of the Act gives ample room for the States to avoid its impact altogether; (2) athough the Act regulates some campaign activity, it does not regulate the States directly; and (3) the BCRA provides a national solution to a national problem, but still leaves room for the States to pursue other forms of campaign finance regulation.

First, the BCRA only impacts state elections that are held in conjunction with federal elections. Most States do hold at least some state elections together with federal elections, for reasons of convenience and efficiency. But no law requires States to schedule elections in this manner. New Jersey, for example, holds its gubernatorial contest in an odd-numbered year, while Vermont schedules some local elections in March, to coincide with its Town Meeting Day. A State that wants to avoid any federal regulation may switch to an off-year schedule for state elections.

The possibility that federal and state elections may be held separately should not be ignored. Federal regulation must be viewed through a different constitutional lens when State and federal activities are voluntarily entwined. If federal elections were held by themselves, Congress unquestionably would have the authority to regulate campaign activities such as voter registration and get out the vote drives. Or, suppose, that as part of BCRA Congress decreed that all federal elections should be held in July instead of November. States that chose to reschedule their own elections would then be voluntarily accepting federal regulation. The same is true here. Nothing in the Constitution suggests that Congress must cede some of its authority to the States merely because the States choose to hold their elections at the same time.

Second, the Act does not regulate the States directly, and therefore leaves untouched such matters as the structure of state government, the qualifications of state officeholders, and the terms and duties of state officials. No restrictions are placed on the state officials who schedule, organize, conduct and review elections. The conduct of campaigns is an unquestionably important part of the democratic process. Nonetheless, there is a constitutionally significant difference between regulating the States directly – which BCRA does not do – and regulating the campaign activities of private individuals and organizations. *See New York v. United States*, 505 U.S. at 166 (distinguishing between Congress's authority to regulate generally in a given area, and Congress's power to directly regulate the States). *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 461, 468 (1991) (suggesting that federal regulation of the qualifications for high-ranking state government officials might impermissibly intrude on state sovereignty).

And third, by passing BCRA Congress provided a national solution to a national problem, but did so in a way that preserves the States' ability to experiment in the area of campaign finance reform. No State standing alone could address the national problem of unregulated soft money. A State may regulate its own state parties but it cannot reach the soft money expenditures that influence federal elections in other states. All Americans are affected by the outcome of federal elections across the country. All Americans are influenced by the perception that large campaign contributions "buy" access to elected officials. After all, once elected, both members of Congress and the President serve the American people as a whole. Only Congress could take the necessary steps to restore integrity to the federal electoral process.

What Congress did not do, however, was attempt to impose uniform national standards on all campaigns and elections. Congress exercised marked restraint, leaving the States largely free to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). The campaigns for state offices – which far outnumber federal contests – remain the province of the States. Congress has not displaced state authority in this area, but has only supplemented state regulation to the extent necessary to reach all federal election activity. *Cf. Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (expressing concern that Congress "displaced state regulation in areas of traditional state concern").

II. The BCRA serves the interests of the States and their citizens by restoring integrity to the national political process, while at the same time fostering substantial political discourse.

Although the BCRA is tailored to regulate federal election activity, at the same time it serves an overriding national purpose that benefits the States and their citizens. The two key provisions of the Act – eliminating the flow of soft money through the political parties, and preventing corporations and unions from spending unlimited funds on sham "issue ads" – are designed to remedy the "disaffection [and] distrust [that] has now spread to the entire political discourse." *Nixon v. Shrink Missouri*, 528 U.S. 377, 408 (2000) (Kennedy, J., dissenting). The Act accomplishes that goal in a manner that ensures an ongoing and vigorous political discourse.

The Act's limitations on the financing of campaigns benefit the States and their citizens in two distinct, though related, ways. First, the day-to-day existence of the States is of necessity bound up with the life of the federal government. The States and their citizens rely on elected federal officials to represent their interests with fidelity and integrity. If federal office holders feel pressured to respond to large donors, or are compelled to spend a substantial portion of their time fundraising, then they are unable to serve the interests they were elected to represent. Indeed, they may be serving the interests of corporate supporters that have only a minimal connection to the office holder's district or State. Both the

States and their citizens have a strong interest in ensuring that federal office holders perform their constitutional obligations free of undue influence.

Second, the States also depend on their citizens' faith in democratic institutions. When the electorate perceives that federal elections are corrupt, this perception taints and brings into disrepute more than just the electorate's view of the federal government. Such a sentiment can lead to a pervasive loss of faith in all our governmental institutions, and a malaise characterized by cynicism, alienation and discontent at the local, State and federal level. A widespread belief that the system is skewed to result in de facto disenfranchisement, or that the allegiance of elected officials is up for bid, leads to a loss of investment and belief in our very system of government. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon v. Shrink Missouri*, 528 U.S. at 390.

The confidence of Americans in their elected officials has been shaken by the influence of money, real or apparent, on the outcome of elections. In a poll taken shortly after the 1996 elections, Americans ranked the "power of special interest groups in politics" second only to international terrorists when asked to identify "major threats" to the future of this country. Princeton Survey Research Associates/Pew Research Center, Public Opinion Survey (Nov. 1996) (available at http: 208..240.91.18/mill2que.htm) (visited Aug. 21, 2002). The change in attitude over the past few decades is striking. In 1964, 29 percent of Americans believed that the government "was pretty much run by a few big interests looking out for themselves" and not "for the benefit of all people." By 1992, that number had ballooned to 76 percent. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 3 & nn.3, 4 (1996) (citing University of Michigan Center for Political Studies, American National Election Studies 1952-1990). In three different polls, three-quarters of the respondents confirmed the now widespread belief that "Congress is largely owned by the special interest groups" and that "[o]ur present system of government is democratic in name only." E. Joshua Rosenkrantz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 16 (1998).

The States and their local governments are inevitably affected by this level of citizen dissatisfaction and distrust. "Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Nixon v. Shrink Missouri*, 528 U.S. at 390 (quoting *United States v. Mississippi Valley Generating Co.*, 362 U.S. 520, 562 (1961)). State and local governments, even more than the federal government, rely on their citizens to participate and serve. Our nation's communities need energetic, committed people to serve on local boards and committees, run for municipal offices, volunteer for emergency services, and otherwise share in the obligations of democratic government. Democracy cannot function at the grassroots level when citizens have no faith in their government or their elected officials.

The BCRA restores citizens' confidence in the people they elect to govern while ensuring an ongoing and vigorous political discourse. Existing campaign limits allow ample room for individuals to participate in the electoral process by providing financial support to candidates. Federal law permits any individual to contribute up to $57,500 per election cycle to a combination of federal candidates, parties, and political committees. 2 U.S.C. § 441a(A)(3)(b) (as amended by BCRA, tit. III, § 307(b), tit. IV, § 402, 116 Stat. 102, 112). This is a staggering sum, given that the median household income in the United States is just $42,100.[4] Few Americans can even come close to making campaign contributions in the amounts permitted by law – meaning that only the most wealthy individuals (and corporate and union donors) have had incentives to evade the limits through soft money expenditures. Campaign finance reform, by enforcing these contribution limits, will retain some role for – and therefore some allegiance to – ordinary citizens who support federal candidates.

[4] See **http://www.census.gov/** (visited Sept. 3, 2002).

Indeed, removing the influence of "big money" will not quash political debate, but reinvigorate it. When the political parties are freed of the race to raise and spend huge amounts of soft money in each federal election cycle, they will be able to refocus their efforts on political organizing at the state and local level. This kind of grassroots campaigning gives ordinary Americans a chance to debate issues and meet candidates – in short, to participate in and establish an allegiance to our national political process. It will give a new purpose to the state and local parties that are best suited to discern and represent the interests of the American people. The changes fashioned by BCRA will not quash liberty but strengthen the democracy that guarantees our freedom.

The Supreme Court has already recognized that the government has a compelling interest in addressing public disdain for the electoral process, "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. Int'l Union United Automobile Workers*, 352 U.S. 567, 575 (1957). The amici States urge this Court to protect the integrity of the federal electoral process and to restore the faith of citizens in all levels of government by upholding the Act.

III. Although campaign finance laws are subject to heightened scrutiny, the courts should afford some latitude to state and federal lawmakers who are searching for ways to restore the faith of citizens in their elected officials.

The States have a keen interest in the outcome of this litigation because the States bear responsibility for ensuring the integrity of their own elections. For this reason, the plaintiffs' combination of constitutional claims carries great irony for the States. In support of their federalism claims, the plaintiffs argue that the federal government should not be permitted to intrude on the States' regulation of elections. At the same time, plaintiffs urge the federal courts to adopt a view of the First Amendment that, if accepted, would drastically limit the ability of state legislatures to enact campaign finance reforms. In ruling on the constitutionality of BCRA, the Court should keep in mind the variety of campaign finance reform measures that state legislature have adopted or are considering. Consistent with the First Amendment, the Court should afford some latitude to both state and federal lawmakers who are grappling with this difficult problem.

In the nearly three decades since *Buckley*, the States have played their role as the laboratories of democracy, experimenting with different forms of campaign finance regulation. A supermajority of the States have enacted campaign limitations based on their studied belief that such regulations are necessary to prevent actual and apparent corruption in state and local government. *See generally* 33 Council of State Governments, *The Book of the States 2000-2001* 174-232 (summarizing state campaign finance legislation). Across the country, lawmakers are considering potential election reforms to address similar concerns. *See*

www.publiccampaign.org/statemap.html (public financing bills were on the agenda in 16 state legislatures in 2001, while coalitions in 23 other states were pursuing reforms).

The Court should not stifle these reform efforts by adopting the rigid views advanced by plaintiffs. Consistent with the First Amendment, courts should and must grant some deference to state and federal legislators – the people who best understand the problem. Legislators are in a unique position to determine what reforms will sustain faith in the electoral process. *See generally FEC v. National Right to Work Comm*., 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference" and that courts will not "second-guess a legislative determination as to the need for prophylatic measures where corruption is the evil feared"). The Supreme Court has recognized as much, holding that the "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (even where the First Amendment is implicated, courts should "accord substantial deference to the predictive judgments of Congress").

The courts should not lightly turn aside the judgments of state and federal lawmakers who find a pressing need for campaign finance reforms. In this case, the

BCRA represents the reasoned and well-supported judgment of Congress that federal election reforms are essential to restoring the faith of the voters. The accumulated experience of members of Congress, reinforced by empirical evidence, is that the dominance of money in politics seriously threatens the public's faith in the legitimacy of government and in the elections that choose whom shall govern. The Court should allow the Federal Government and the States, within constitutional limits, to continue the work of reforming our nation's election.

CONCLUSION

For the foregoing reasons, the amici States urge this Court to uphold the constitutionality of BCRA.

Respectfully submitted,

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